Supreme Court, U.S.
FILED
05-748 DEC 7 - 2005
OFFICE OF THE CLERK

No. _____

# In the Supreme Court of the United States

CHARLES POINTER,

*Petitioner,*

v.

DART,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit sanctioned the United States District Court of Eastern Missouri to so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers when it failed to grant a new trial after finding that the United States District Court abused its discretion when the District Court, set a hearing, sua sponte and at said hearing quashed Plaintiff's Subpoenas of certain witnesses who were employees of the federal government?

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## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 2a-8a) is reported at 417 F.3d 819. The opinion of the district court (App., *infra*, 9a-12a) is unreported.

## JURISDICTION

The court of appeals entered its judgment on August 1, 2005. (App., *infra*, 2a-8a). The Petition for Rehearing En Banc was denied on September 8, 2005. (App, *infra,* 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

## STATEMENT OF CASE

Petitioner was employed as an outpatient counselor at Respondent's drug abuse rehabilitation facility located at 4000 Laclede Ave., St. Louis, Missouri. As a trained counselor with a Master of Science degree specializing in counseling education from Southern Illinois University at Edwardsville, Petitioner counseled individuals on parole and serving probation. During late March or early April of 2000, Petitioner was notified by his supervisor, Mr. Milford Eaves, that he would replace Mr. Eaves temporarily as supervisor and mental health screener while Mr. Eaves took a leave of

absence. Aside from his supervisor, Petitioner was the only employee with a Master's degree at Respondent's outpatient facility and consequently was the only other employee qualified to perform mental health screenings. Several employees of the U.S. Probation and Pretrial Services Offices were also informed of Petitioner's interim supervisory position. However, Petitioner was never given the chance to serve in this interim capacity and was terminated from his counseling position with Respondent on May 18, 2000.

Mr. Eaves testified unequivocally in his deposition that U.S. Pretrial Services Officer Kevin Carbol and U.S. Probation Officer Dan McClintock individually, and separately pressured him to terminate Petitioner from his employment with Respondent. Mr. Carbol and Mr. McClintock supervised the individuals assigned to Respondent for treatment during pre- and post-incarceration periods and had frequent contact with Respondent's supervisors and counselors.

Mr. Eaves also testified that Mr. Carbol, Mr. McClintock and U.S. Probation Officer Thomas Caruso allowed an unqualified Caucasian individual to perform supervisory duties with Respondent while maintaining that Petitioner, despite his Master of Science degree specializing in counseling education, had documentation deficiencies and was therefore unqualified for a non-supervisory counseling position.

After learning of Mr. Eaves' testimony in deposition, Petitioner contacted Mr. Carbol, Mr. Caruso and Mr. McClintock by letters dated November 21, 2003. Petitioner requested informal interviews in accordance with U.S. Attorney protocol since the formal discovery deadline had passed. By letter dated December 1, 2003, Chief Pretrial

Services Office, Mr. Eugene C. Kain, Jr., stated that the Office of General Counsel for U.S. Pretrial Services would not consent to any informal interviews and instead would require a subpoena. Upon receipt of such correspondence, Petitioner served subpoenas on Messrs. Carbol, Caruso, and McClintock commanding each to attend and give testimony at the trial between Petitioner and Respondent.

Each subpoena was properly served pursuant to Rule 45 of the Federal Rules of Civil Procedure. Mr. Caruso was personally served by a process server at his place of business on January 2, 2004; Messrs. Carbol and McClintock were personally served at their places of business three days later on January 5, 2004. These witnesses were not expected to testify until several weeks later on January 26, 2004. Messrs. Carbol, Caruso, and McClintock were hardly inconvenienced since each works in the same courthouse in which they were called to testify. They were simply asked to remain on telephone standby and to take an elevator upstairs to testify when called upon by the district court. None of the subpoenaed individuals had been asked to disclose privileged information. Instead, each individual would have been asked to testify factually regarding his personal interaction with Respondent's supervisors and staff.

Pursuant to federal and local rules, subpoenas for trial testimony are not filed with the district court. Counsel for Petitioner received a telephone call from the district court's secretary informing him that the court, sua sponte, scheduled a hearing on Thursday, January 8, 2004 to discuss the enforceability of the subpoenas Petitioner had caused to be served on Messrs. Carbol, Caruso, and McClintock. Petitioner had not filed a Motion to Enforce the Subpoenas and no party or interested person had filed a Motion to Quash. Petitioner filed his Motion in Support of Enforcement of

Subpoenas after the district court scheduled the hearing to determine whether the subpoenas would be enforced.

The Eighth Circuit said in its Opinion, "It appears that the Assistant United States Attorney representing the Office had contacted the district court ex parte and urged it to rule on the matter."

No testimony was presented during the district court's January 8, 2004 hearing to determine whether the subpoenas would be enforced.

The district court denied enforcement of the subpoenas but allowed Petitioner to receive, for the first time, a copy of the contract between Respondent and the U.S. Probation and Parole Services Offices, entitled, "Treatment Services for Federal Defendants and Offenders." This contract was of little probative value because it neither addressed the relationships generally between the U.S. Probation and Parole Services Offices and Appellee, nor did it contain specific information about Mr. Eaves' contact with Messrs. Carbol, Caruso, and McClintock.

Evidence regarding Messrs. Carbol, Caruso, and McClintock was not presented at trial. Mr. Eaves testified regarding Petitioner's employment with Appellee and did not reference the subpoenaed individuals. Mr. Eaves was the only witness to testify to the specific reasons for Petitioner's termination. The testimony of Messrs. Carbol, Caruso, and McClintock may have contradicted Mr. Eaves' allegations. Pursuant to the district court's order, these witnesses did not testify. The jury did not find on behalf of Petitioner and instead rendered a judgment in favor of Respondent on January 28, 2004.

Petitioner subsequently filed an appeal with the Eighth Circuit on August 3, 2004 and was granted an oral argument, scheduled for February 18, 2005. This Court filed its Opinion in favor of Appellee on August 1, 2005. Petitioner's Petition for Rehearing and Rehearing En Banc was denied on September 8, 2005.

## REASONS FOR GRANTING THE WRIT

Petitioner's right to trial under the seventh amendment of the United States Constitution was effectively denied by the District Court when it failed to enforce subpoenas which were essential if the Petitioner was to have the opportunity to prove his case.

It does not follow that the court of appeals found that the district court abused its discretion when it, sua sponte, quashed the subpoenas of four employees of the federal government but then the court of appeals said if these four witnesses would have testified it would not have affected the outcome of the case. We cannot know the effect these witnesses would have had on the jury because the witnesses were not allowed to testify. Further, the record demonstrates these witnesses were essential for the jury to determine whether Petitioner was fired as a result of racial discrimination.

Evidentiary rulings must be affirmed unless they affect a substantial right of a complaining party. *Foster v. Ford Motor Co.*, 621 F.2d 715 (Fifth Cir. 1980). This rule instructing that error may not be predicated on an evidentiary ruling unless a "substantial right of the party is affected" necessarily implies that, if there is a reasonable likelihood that a substantial right was affected, the effort should not be found harmless. *Johnson v. William C. Ellis & Sons Iron Works,*

*Inc.*, 609 F.2d 820 (Fifth Cir. 1980). These facts required the Eighth Circuit to develop the "definite and firm conviction that a mistake had been committed" which would warrant not accepting the trial court's findings. *United States v. United States Gypsum Company*, 333 U.S. 364, 395 (1948).

Additionally, since the trial court based its findings upon a mistaken impression of applicable legal principles, the Eighth Circuit was not even bound by the clearly erroneous standard. *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 194 (1963). As far back as *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879), this Court has said the appellate court may reverse a district court's decision when the ruling to receive or exclude evidence is manifestly erroneous. Certain general principles govern the appellate court's power to overturn findings of a district court. The foremost of these principles is that a finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. *Anderson vs. City of Bessemer City, N.C.*, 470 U.S. 564 (1985); *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993). While Rule 52(a) admonishes due regard for the trial court's opportunity to assess the credibility of witnesses, the trial judge's views as to credibility are not completely impervious. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

As the Eighth Circuit established in its Opinion, the district court abused its discretion when it *sua sponte* scheduled a hearing to determine whether it would enforce Petitioner's subpoenas and then subsequently denied enforcement of the subpoenas. However, the subpoenaed individuals' testimony was not only relevant but also essential to the fair adjudication of Petitioner's claims. Respondent's

own witness testified that the subpoenaed individuals pressured him to terminate Petitioner. The testimony of these very individuals could be no more relevant to Petitioner's claims. The district court's refusal to require these witnesses to testify constituted prejudicial error, an abuse of discretion and reversible error. The subpoenaed individuals' denial of Respondent's witness' allegations would have called into question this witness' credibility and affected the outcome of the trial. For this reason, this Writ should be granted because the U.S. Probation and Pretrial Services officers' trial testimony would have more likely than not produced a different result.

The district court's abuse of discretion was so prejudicial that the jury had no choice but to find against Petitioner. By refusing to enforce Petitioner's subpoenas, the district court prevented him from confirming or refuting testimony given by Respondent's own witness, Mr. Milford Eaves. This ruling in question was so consequential that a new trial allowing the evidence would likely produce a different result. *Bevan v. Honeywell*, Inc., 118 F.3d 603, 612 (8th Cir. 1997).

Mr. Eaves claimed in his deposition that Mr. Carbol and Mr. McClintock pressured him to terminate Petitioner. The only evidence concerning this issue is from Respondent's own employee, who claims that he felt pressure from the probation and parole officers to terminate Petitioner. Petitioner had no choice but to further investigate Mr. Eaves testimony until confirmed or refuted by concrete evidence or testimony. A denial of Mr. Eaves' allegations undoubtedly would have called into question Mr. Eaves' credibility and affected the outcome of the trial. Refusing to allow Petitioner to examine the information necessary to contradict Mr. Eaves is a clear abuse of discretion by the trial court. *Slathar v. Sather Trucking Corp.*, 78 F.3d 415, 419 (8th Cir.), cert. denied, 519

U.S. 867 (1996); *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1990). However, Petitioner will never know what the subpoenaed individuals' testimony would have revealed during the trial because the district court abused its discretion when it prevented these witnesses from testifying. The district court's abuse of its discretion justifies a reversal by this court. *Green v. American Airlines, Inc.*, 804 F.2d 453 (8th Cir. 1986); *Vassar v. Solem*, 763 F.2d 975 (8th Cir. 1985); *Warner v. Transamerica Insurance Company*, 739 F.2d 1347 (8th Cir. 1984).

Messrs. Carbol, Caruso, and McClintock were all listed on Petitioner's Witness List filed with the district court and served on Respondent's counsel. As previously stated, these individuals were properly disclosed before trial through the deposition testimony of Respondent's own witness, Mr. Eaves, and would have presented non-cumulative testimony. Allowing this testimony would more likely than not produce a different result at a new trial. For these reasons, the district court's refusal to enforce Petitioner's subpoenas constituted an abuse of discretion as well as reversible error. *Manning v. Lockhardt*, 623 F.2d 536, 539-40 (8th Cir. 1980) (district court's refusal to issue subpoena and allow important testimony for plaintiff constituted an abuse of discretion as well as reversible error); *see also, Wilson v. State Farm Fire & Cas. Ins. Co.*, 88 Fed. Appx. 810 (5th Cir. 2004) (district court committed reversible error when it, *sua sponte*, excluded a witness' testimony for reasons of incompetency). Justice dictates that this Writ be granted.

## CONCLUSION

For the aforementioned reasons, Petitioner's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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Counsel for Petitioner
Charles Pointer

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**No. 04-2425**

**[Decided September 8, 2005]**

| | |
|---|---|
| Charles Pointer | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| DART, | ) |
| Defendant-Appellee. | ) |
| | ) |

### Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**No. 04-2425**

**[Filed August 1, 2005]**

| | |
|---|---|
| Charles Pointer | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| DART, | ) |
| Defendant-Appellee. | ) |
| | ) |

Appeal from the United States District Court for the Eastern District of Missouri

### OPINION

WOLLMAN, Circuit Judge.

Charles Pointer appeals from the district court's denial of his motion for a new trial following a jury verdict adverse to his claims of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. We affirm.

## I.

Pointer is an African American male who holds a master's degree in counseling education. From January 7, 2000, to May 18, 2000, he was employed as an outpatient counselor by Drug Alcohol Rehabilitation and Treatment, Inc. (DART), a drug and alcohol treatment organization in St. Louis, Missouri. Pointer's employment contract with DART stipulated that he could be "terminated with or without cause, and with or without notice, at any time, at the option of either DART or himself, except as otherwise provided by law."

DART contracted with the Probation and Pretrial Services Office of the United States District Court for the Eastern District of Missouri (Office) to provide services on their behalf. Milford Eaves, a DART employee, directed the contract program and supervised Pointer. When Eaves took a leave of absence, he selected Cheryl Gardine (a Caucasian female) instead of Pointer to be his temporary replacement. Eaves testified that although Gardine was "technically" unqualified for the position because she lacked a master's degree (a requirement under DART's contract with the Office), the appointment was "considered an interim procedure and not something that would be implemented beyond . . . a temporary period of time." Eaves also testified that Office employees Kevin Carbol, Dan McClintock, and Thomas Caruso had indicated to him that they were comfortable with Gardine's performance and supported her selection for the temporary position.

Pointer's clients included individuals on parole and serving probation who were referred by the Office. Eaves testified that Carbol and McClintock complained to him about Pointer's performance. Eaves stated that Carbol told him on two or three occasions that he had difficulty reading Pointer's

notes and was surprised and disappointed by Pointer's low documentation standards and that Carbol admonished him "for not finding a replacement [for Pointer] sooner." According to Eaves, McClintock also complained to him about Pointer at least twice. Eaves shared these concerns with senior managers at DART, who instructed him to resolve the problem.

Eaves met with Pointer on several occasions to discuss his work performance. One of the issues that they discussed was Pointer's handwriting. Because Pointer's cursive was difficult to read, Eaves asked Pointer to write in print. When Pointer's handwriting remained illegible, Eaves gave Pointer a "supervision document" that set forth a time frame for him to improve his handwriting. When Pointer continued to show a lack of improvement, Eaves fired him. Pointer's termination letter indicated that he was fired for "clinical documentation deficiencies." The letter indicated that Eaves had discussed these and other issues with Pointer on three prior occasions, and Pointer acknowledged by signing at the bottom of the letter that he had been given an opportunity to correct them.

Pointer sued DART for racial discrimination, alleging failure to promote (arising from Eaves's selection of Gardine rather than Pointer as his temporary replacement) and wrongful discharge. After deposing Eaves, Pointer requested informal interviews with Carbol, McClintock, and Caruso. The Office denied this request and suggested that Pointer subpoena the individuals. Pointer served all three with subpoenas and filed a motion to enforce the subpoenas.[1] At a

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[1] Pointer apparently filed his motion after the district court *sua sponte* scheduled a hearing to determine whether the subpoenas would be enforced. It appears that the Assistant United States Attorney representing the Office had contacted the district court *ex*

hearing on the motion, Pointer argued that the testimony of the Office employees could undermine Eaves's contention that he fired Pointer at their behest and under pressure from them. The district court ordered that the Office produce a copy of its contract with DART, which would establish that anything that Office employees said to Eaves would have had "no legal effect" because DART's personnel decisions were its own responsibility. The district court then denied the motion to enforce the subpoenas.

The matter proceeded to trial, and a jury found in favor of DART. The district court denied Pointer's motion for a new trial (which asserted that Pointer had been prejudiced by the district court's decision not to enforce the subpoenas), noting that "even assuming that Plaintiff could demonstrate that the subpoenas at issue should have been enforced, Plaintiff has failed to persuade the Court that testimony from the probation officers would likely have produced a different result in this case."

## II.

We review orders quashing a subpoena for abuse of discretion. *Miscellaneous Docket Matter #1 v. Miscellaneous Docket Matter #2*, 197 F.3d 922, 925 (8th Cir. 1999). On timely motion, a district court shall quash or modify a subpoena if the subpoena fails to allow reasonable time for compliance, requires a witness who is not a party to travel more than 100 miles, requires disclosure of privileged or protected matter, or subjects a person to undue burden. Fed. R. Civ. P. 45(c)(3)(A)(iii). A subpoena must also seek relevant information. *Roberts v. Albright-Roberts Chevrolet*,

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*parte* and urged it to rule on the matter.

*Inc.*, 352 F.3d 358, 360-62 (8th Cir. 2003); Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . ."). We review relevancy determinations for abuse of discretion. Roberts, 352 F.3d at 360 (citation omitted).

The district court failed to identify any of the reasons listed in Rule 45 as the basis for its decision to deny Pointer's motion to enforce the subpoenas. Further, nothing in the record suggests that any of the subpoenaed witnesses would be inconvenienced (all three worked in the same courthouse in which they were called to testify) or that Pointer sought privileged information through their testimony. Whether the testimony of the Office employees was relevant is a closer call. The district court assumed that the testimony was not relevant because the Office employees had no control over DART's personnel decisions. Pointer, however, intimated that he sought the testimony for impeachment purposes, not to establish the Office's influence on personnel decisions. Mot. Hrg. Tr. at 3 ("This is a case where [Eaves] said, 'These men told me to do it, and I've done it.' And we just want to find out if that's the truth."). The potential testimony thus fell within the broad scope of Rule 26. Accordingly, we conclude that the district court abused its discretion in denying the motion to enforce the subpoenas.

## III.

Although the district court erred in failing to enforce the subpoenas, Pointer must also show that the district court abused its discretion in denying his motion for a new trial. *See O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1991) (citation omitted). To do so, he must demonstrate that the district court's evidentiary error affected his substantial rights. *Id.*; see also Fed. R. Evid. 103(a) (erroneous

evidentiary ruling must affect a substantial right of the party). The error must be such that a new trial "would be likely to produce a different result." *O'Dell*, 904 F.2d at 1200 (citation omitted). The trial court is in the best position to determine whether the alleged error affected the substantial rights of any party sufficient to warrant a new trial, and the trial court's decision is entitled to considerable deference. *Id.* (citation omitted).

Eaves testified in his deposition that Carbol and McClintock pressured him about finding a replacement for Pointer because Pointer's work "did not fall within what they considered to be appropriate or professional documentation standards." Pointer's theory of prejudice is that, had the district court enforced the subpoenas, Carbol and McClintock would have denied Eaves's allegations, which "undoubtedly would have called into question[] [Eaves's] credibility and affected the outcome of the trial." Pointer Reply Br. at 9.[2] Pointer's speculative assumption as to what Carbol and McClintock's testimony would have been is unsupported by the record. Cf. *Manning v. Lockhart*, 623 F.2d 536, 540 (8th Cir. 1980) (district court's refusal to grant subpoena prejudiced plaintiff when the transcript made clear that the witness would have provided key testimony in support of plaintiff's claim).

The jury apparently found Eaves's testimony credible. From the record we have before us, we cannot conclude that it is likely that, had the subpoenas been enforced, Carbol and McClintock would have contradicted Eaves's testimony and the jury would have rejected Eaves's stated reasons for firing

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[2] Pointer does not argue that he was prejudiced by the district court's failure to enforce the subpoena served on Caruso.

Pointer and instead concluded that he fired Pointer because of his race.

The judgment is affirmed.

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF**
**MISSOURI EASTERN DIVISION**

**No. 4:02CV00469 JCH**

**[Filed May 17, 2004]**

Charles Pointer )
Plaintiff, )
)
v. )
)
DART, )
Defendant )

## MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff's Motion for a New Trial (Doc. # 73). Defendant has filed a Memorandum in Opposition to Plaintiff's Motion (Doc. # 75), and the matter is ready for disposition.

## BACKGROUND

After being terminated from his position with Defendant DART, Plaintiff brought this suit alleging that he had been

subjected to discrimination on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*.

Prior to trial, Plaintiff, through his counsel, issued subpoenas to Mr. Kevin Carbol, a U.S. Pretrial Services Officer, Mr. Thomas Caruso, a U.S. Probation Officer, and Mr. Dan McClintock, also a U.S. Probation Officer. (Plaintiff's Memo of Law in Support of his Motion for a New Trial ("Plaintiffs Memo of Law"), P. 1). Plaintiff contends that these subpoenas were issued in response to allegations that these men were involved in the adverse decision at issue in this case. (Plaintiff's Memo of Law, P.2). It is uncontested that these men were not employed by Defendant.

The Court held a hearing on January 8, 2004 to determine whether these subpoenas should be enforced. After hearing arguments from counsel for both sides, the Court determined that the subpoenas would not be enforced. The Court did order, however, that both parties be given access to a copy of the contract detailing the relationship between Defendant and the U.S. Probation and Parole Service.

Following a three-day trial, the jury found in favor of Defendant on all counts. Plaintiff now contends that he is entitled to a new trial under Rule 59 of the Federal Rules of Civil Procedure on the grounds that the Court committed reversible error by not enforcing the subpoenas against Mr. Carbol, Mr. Caruso, and Mr. McClintock.

## DISCUSSION

"The authority to grant a new trial on a motion pursuant to Federal Rule of Civil Procedure 59 is within the discretion of the district court." *Douglas Cty. Bank & Trust Co. v. United*

*Financial Inc.*, 207 F.3d 473, 478 (8th Cir. 2000) (Citations omitted). The admission of evidence is similarly "committed to the sound discretion of the district court." *Bevan v. Honeywell*, 118 F.3d 603, 612 (8th Cir. 1997). In order to demonstrate that a new trial is warranted in this case, Plaintiff must demonstrate that the exclusion of evidence, if erroneous, was "so prejudicial that a new trial would likely produce a different result." *Id. See also, Children's Broadcasting Corp., v. The Walt Disney Co.*, 357 F.3d 860,867 (8th Cir. 2004); *Wheeler v. Missouri Highway & Transportation Commission*, 348 F.3d 744,749 (8th Cir. 2003); *Schultz v. McDonnell Douglas Corp.*, 105 F.3d 1258,1259 (8th Cir. 1997) (Citations and internal quotations omitted).

Upon careful review of the record and application of the above standards, the Court finds Plaintiff's contentions to be without merit. Even assuming that Plaintiff could demonstrate that the subpoenas at issue should have been enforced, Plaintiff has failed to persuade the Court that testimony from the probation officers would likely have produced a different result in this case.

Defendant presented substantial evidence to support its contentions that Plaintiff was terminated because of deficiencies in his performance and that race did not play a part in the decision, and the jury was entitled to credit that evidence. A new trial is not warranted under these circumstances.

## CONCLUSION

Accordingly,

**IT IS HEREBY ORDERED** that Plaintiff's Motion for a New Trial (Doc. # 73) is **DENIED**.

Dated this 17th day of May, 2004.

/s/ _____
Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF**
**MISSOURI**

**No. 4:02CV00469 JCH**

**[Filed January 28, 2004]**

| | |
|---|---|
| Charles Pointer | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| DART, INC., | ) |
| Defendant | ) |
| | ) |

**JUDGMENT IN A CIVIL CASE**

[X] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS HEREBY ORDERED AND ADJUDGED that On the failure to promote claim of Plaintiff, Charles Pointer, as submitted in Instruction No. 10, we find in favor of: Defendant Dart. Has it been proved by the greater weight of the evidence that Defendant would have failed to promote Plaintiff regardless of his race? (YES); On the wrongful

termination claim of Plaintiff, Charles Pointer, as submitted in Instruction No. 11, we find in favor of: Defendant Dart. Has it been proved by the greater weight of the evidence that Defendant would have discharged Plaintiff regardless of his race? (YES)

James G. Woodward
CLERK

DATE January 28, 2004

By: /s/ _____
M. Mosley
DEPUTY CLERK

## APPENDIX E

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF**
**MISSOURI**

**No. 4:02CV00469 JCH**

**[Filed January 28, 2004]**

| | |
|---|---|
| Charles Pointer | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| DART, INC., | ) |
| Defendant | ) |
| | ) |

### VERDICT 1

On the failure to promote claim of Plaintiff, Charles Pointer, as submitted in Instruction No. 10, we find in favor of:

*Defendant DART*

Note: Answer the next question only if the above finding is in favor of Plaintiff. If the above finding is in favor of

Defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Has it been proved by the greater weight of the evidence that Defendant would have failed to promote Plaintiff regardless of his race?

X Yes

/s/ _____
Sally S. Weaver
Foreperson

Date January 28, 2004

## APPENDIX F

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF**
**MISSOURI**

**No. 4:02CV00469 JCH**

**[Filed January 28, 2004]**

| | |
|---|---|
| Charles Pointer | ) |
| Plaintiff, | ) |
| | ) |
| | ) |
| v. | ) |
| | ) |
| | ) |
| DART, INC., | ) |
| Defendant | ) |
| | ) |

## VERDICT 2

On the wrongful termination claim of Plaintiff, Charles Pointer, as submitted in Instruction No. 11, we find in favor of:

*Defendant DART* _____

Note: Answer the next question only if the above finding is in favor of Plaintiff. If the above finding is in favor of

Defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Has it been proved by the greater weight of the evidence that Defendant would have discharged Plaintiff regardless of his race?

X Yes

/s/ _____
Sally S. Martin
Foreperson

Date January 28, 2004